

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

Original & Affidavit of Mailing

77-1385

To be argued by
ALVIN A. SCHALL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1385

UNITED STATES OF AMERICA,
Appellant,
- against -
CANDIDO NATAL RIQUELMY and
FELIX LOPEZ,
Appellees.

*B
P/S*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
Assistant United States Attorney,
(Of Counsel).

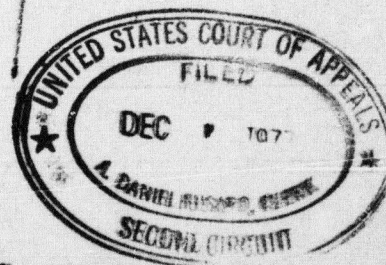
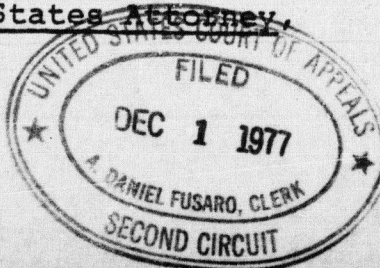


TABLE OF CONTENTS

	PAGE
ARGUMENT:	
Reply To Appellees' Briefs	1
CONCLUSION:	4

TABLE OF CASES

<u>Jones v. United States</u> , 362 U.S. 257 (1960)	2
<u>United States v. Banerman</u> , 552 F.2d 61 (2d Cir. 1977)	3
<u>United States v. Masterson</u> , 383 F.2d 610 (2d Cir. 1967), cert. denied, 390 U.S. 954, rehearing denied, 391 U.S. 909 (1968)	2
<u>United States v. Tortorello</u> , 533 F.2d 809 (2d Cir.), cert. denied, ___ U.S. ___, 97 S.Ct. 254 (1976)	3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1385

UNITED STATES OF AMERICA,
Appellant,

- against -

CANDIDO NATAL RIQUELMY and
FELIX LOPEZ,
Appellees.

REPLY BRIEF FOR THE APPELLANT

ARGUMENT

REPLY TO APPELLEES' BRIEFS

In their briefs, appellees make two arguments. First, they contend that they do have standing under the conspiracy and Travel Act counts of the indictment to contest the search of Eddie Riquelmy's jacket and the seizure from him

of the narcotics. Second, they claim that the United States is barred from arguing standing on appeal because it allegedly did not raise the issue in the district court. Since we believe our main brief fully treats the merits of the standing issue, we will only reply here to appellees' second argument.

There is clearly no merit to the claim that the United States is barred from arguing standing on appeal. In the first place, on a motion to suppress, the defendant has the burden of asserting and establishing his standing. Jones v. United States, 362 U.S. 257, 261 (1960); United States v. Masterson, 383 F.2d 610, 613-614 (2d Cir. 1967), cert. denied, 390 U.S. 954, rehearing denied, 391 U.S. 909 (1968). Here, appellees did neither. Secondly, in a memorandum of law filed in the district court on May 18, 1977, a week after the suppression hearing and well over two months prior to Judge Costantino's decision (August 3, 1977), we did contest appellees' standing (Appellant's Appendix, pages 207-214). Appellees thus had more than ample time to assert their standing. And finally, since standing is a matter of law, the prosecution can even concede standing in the district court and still raise the issue on appeal, because concessions on questions of law are not binding on this Court.

United States v. Banerman, 552 F.2d 61, 62-63 (2d Cir. 1977);
United States v. Tortorello, 533 F.2d 809, 812 (2d Cir.), cert.
denied, ___U.S.____, 97 S.Ct. 254 (1976). Thus, where, as here,
the government has contested standing in the district court, -
is frivolous to argue that the issue cannot be raised on appeal.

CONCLUSION

The order of the district court should be vacated with respect to Candido Riquelmy and Felix Lopez, and the case should be remanded for further proceedings.

Dated: Brooklyn, New York
December 1, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
Assistant United States Attorney,
(Of Counsel).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 1st day of December 1977 he served a copy of the within
Reply Brief for the Appellant

by placing the same in a properly postpaid franked envelope addressed to:

Stephen R. Laifer, Esq. = Julian S. Linker

166 Montague St.

225 Broadway

Brooklyn, N.Y. 11201

New York, N.Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

1st day of December 1977

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-6646824
Qualified in Kings County
Commission Expires March 30, 1979